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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT DAVIDSON,

Petitioner,

v.

JOSEPH CANNON and ROBERT JAMES,

Respondents.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS,
THIRD CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of Amici	2
Argument	4
I. THE COURT BELOW CORRECTLY HELD THAT WHILE THE INMATE PLAINTIFF HAD A LIBERTY INTEREST UNDER THE FOURTEENTH AMENDMENT IN BEING SECURE FROM ATTACK BY FELLOW INMATES, THE NEGLIGENCE OF DEFENDANTS BELOW DID NOT AMOUNT TO A VIOLATION OF 42 U.S.C. § 1983	4
Conclusion	10

TABLE OF AUTHORITIES

Cases

	PAGE
Baker v. McCollan, 443 U.S. 137 (1979)	7
Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984), cert. granted, 53 LW 3626	8
Davidson v. O'Lone, 752 F.2d 817 (3rd Cir. 1984)	4, 8
Gunther v. Holmgreen, et al., 738 F.2d 879 (7th Cir. 1984)	8
Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982)	8
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981)	8
Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. 3194 (1984)	7
Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983)	8
Maine v. Thiboutot, 448 U.S.1 (1980)	6
Oklahoma City v. Tuttle, ___ U.S. ___, 105 S.Ct. 2427 (1985)	8
Parratt v. Taylor, 421 U.S. 527 (1981)	5, 7
Thibodeaux v. Borderlon, et al., 740 F.2d 329 (5th Cir. 1984)	8
Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985)	7, 8

Statutes

42 U.S.C. § 1983	*passim*

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Irwin I. Kimmelman, Attorney General, State of New Jersey, Counsel for Respondents, and James D. Crawford, Esq., Counsel for Petitioner. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty-three times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The *International Association of Chiefs of Police, Inc.* (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The *National Sheriffs' Association*, is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Fourteenth Amendment.

Amici well know the problems faced by prison and jail officials in their good faith attempts to conform their conduct to

the requirements of law pertaining to prisoners' rights, and to avoid possible civil liability for themselves and their agencies. The state of this intricate complex of rules compels these organizations to speak on behalf of these officials in this case.

ARGUMENT

I.

THE COURT BELOW CORRECTLY HELD THAT WHILE THE INMATE PLAINTIFF HAD A LIBERTY INTEREST UNDER THE FOURTEENTH AMENDMENT IN BEING SECURE FROM ATTACK BY FELLOW INMATES, THE NEGLIGENCE OF DEFENDANTS BELOW DID NOT AMOUNT TO A VIOLATION OF 42 U.S.C. § 1983.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the International Association of Chiefs of Police, various state associations of chiefs of police, and the National Sheriffs' Association. Those briefs have presented an analysis of relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder the effective administration of justice without impinging upon basic constitutional protections. In the present brief, we will not undertake an extensive analysis of the case law but will confine our brief to what *amici* believe to be the central issue—do all instances of "simple" negligence on the part of public officials or employees give rise to a violation of 42 U.S.C. § 1983.

The Circuit Court of Appeals held, *Davidson v. O'Lone*, 752 F.2d 817 (3rd Cir. 1984), that the negligent failure of defendants below to protect the inmate plaintiff did not give rise to a claim under 42 U.S.C. § 1983 even though New Jersey law provided no remedy in a state court or administrative proceeding for the inmate plaintiff. *Amici* herein neither believe nor argue that the issue of whether or not "simple" negligence amounts to a violation of 42 U.S.C. § 1983 is dependent upon the availability of a state remedy. Rather, *amici* believe that the availability of a state remedy only comes into play in such an analysis when the taking of property or

impingement of liberty under the Fourteenth Amendment is implicated.

While the recitation of the facts are fully set forth in the briefs of the parties, *amici* believe that a brief summary of what occurred is appropriate for purposes of the argument that we make herein.

Inmate Robert Davidson intervened in a fight between two other inmates at the Luesburg State Prison. One of the inmates involved in the fight (McMillian) threatened Davidson because of Davidson's intervention. Davidson wrote a note reporting the threat and gave it to a guard to give to the prison hearing officer. The prison hearing officer told the guard to pass the note to the proper officials. It was given to the prison's assistant superintendent who in turn gave it to a correctional sergeant. The sergeant ultimately got the note but left the note on his desk while he attended to other matters in the institution.

The note was written on December 19 in the morning and reached Sergeant James at approximately 2:00 p.m. that day. Neither the assistant superintendent nor Sergeant James worked on December 20 or 21. On December 21, Davidson was attacked by the inmate who had made the threat on December 19. In essence, Sergeant James "forgot" about the note.

Finally, as to the facts, inmate Davidson took no other steps to notify the authorities; did not request protective custody; did not foresee or anticipate any attack; and wrote the note to exonerate himself in the event that inmate McMillian started another fight.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court concluded:

> Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the

> Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under Section 1983. Such reasoning would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Paul v. Davis*, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

451 U.S. at 544.

42 U.S.C. § 1983 in and of itself does not provide any substantive rights or causes of action; it provides merely the form of remedy. Liability under § 1983 does not attach unless the plaintiff establishes a violation of a substantive federal constitutional or statutory violation. The core element of a § 1983 action has been, is, and should remain, abuse by a public official or employee of his or her position where the abuse amounts to violation of a federal constitutional or statutory provision.

While there has been considerable confusion and disagreement among the courts as to the scope of § 1983 liability where the substantive issue involved is what is in essence traditional concepts of common law negligence, *amici* herein submit that the better reasoned view is that traditional common law negligence is not actionable under § 1983 absent an allegation or proof of abuse by a public official or employee and further where such abuse violates a constitutional provision or a federal statute.[1]

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[1] See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

Amici herein suggest that the Court's opinions over the last several years on this admittedly troublesome issue from both the legal and policy perspectives mandate such a result.

In *Baker v. McCollan*, 443 U.S. 137 (1979), the Court held that mistaken identification by police officers which led to the arrest of the wrong person did not deprive the plaintiff of any rights secured by the Constitution. The initial teaching of *Baker, supra*, was clear—actions by public officials or employees that involve a mistake or error (i.e.,—"simple negligence") do not state a claim under § 1983 since the conduct therein did not rise to the level of a constitutional violation, absent abuse, intent, a state of mind, or conduct which could be characterized as deliberate indifference or disregard.

In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court held that the negligent taking of a prisoner's property as a result of a random and unauthorized act by a state employee acting under color of law did not amount to a deprivation of property within the context of the Fourteenth Amendment (i.e., without due process of law) since the state provided a post-deprivation remedy.

The Court's holding in *Parratt, supra*, was subsequently extended to intentional deprivations of property in *Hudson v. Palmer*, ____ U.S. ____, 104 S.Ct. 3194 (1984). The "window" that has remained open is the appropriate standard for Section 1983 liability where a deprivation of liberty without due process of law is involved. The United States Court of Appeals for the First Circuit recently described the dilemma as:

> . . . the determination whether simple or gross negligence applies, and its implications for this case are shrouded in the mists that presently envelop this area of the law. But, acting by such lights as are available, we do not believe that an actor as remote from the primary civil rights violation as Wheeler is to be held liable under Section 1983.

Voutour v. Vitale, et al., 761 F.2d 812 at 818 (1st Cir. 1985).

The Court in the case at bar has the opportunity to dissipate "the mists that presently envelop this area of the law."

The view that *amici* herein urge is consistent with the emerging jurisprudence from the Circuit Courts of Appeal on closely related matters, as exemplified by the following cases:

1. *Daniels v. Williams*, 748 F.2d 229 (4th Cir. *en banc*, 1984), cert. granted, 53 LW 3626, holding in part that "simple" negligence does not state a claim under § 1983, and *Voutour v. Vitale, et al.*, 761 F.2d 812 (1st Cir. 1985), holding that "simple" negligence in the shooting of a citizen by a police officer likewise does not state a claim under § 1983;

2. *Gunther v. Holmgreen, et al.*, 738 F.2d 879 (7th Cir. 1984) and *Thibodeaux v. Borderlon, et al.*, 740 F.2d 329 (5th Cir. 1984), holding that the availability of state tort remedies precludes claims under § 1983 for what would normally be considered common law "intentional" torts; and

3. *Oklahoma City v. Tuttle*, ____ U.S. ____, 105 S.Ct. 2427 (1985); *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983); *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982), and *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981), all holding that at least gross negligence amounting to deliberate indifference must be proven in order for a municipality to be liable under § 1983 for a failure to train. The training must be so reckless or grossly negligent that future police misconduct is inevitable.

Amici urge the Court to adopt the view of the Circuit Court of Appeals below, to wit: "A construction that § 1983 does not encompass negligence actions does not restrict its function as the primary vehicle to provide redress for unconstitutional action by state employees that violates the Constitution. . . " 752 F.2d 817 at 827.

Amici submit that § 1983 should fulfill only its intended purpose—as the primary vehicle by which individuals have

recourse against public officials and employees who, while acting under color of law, deprive individuals of rights, privileges and immunities guaranteed by federal constitutional and statutory law. *Amici* respectfully submit that not every "mistake" made by a public official or employee in the course of their duties is of constitutional magnitude so as to be actionable under § 1983. To so hold would truly, as Justice Rehnquist stated, allow § 1983 to be used as a "font" of tort law to be superimposed over traditional concepts of state tort jurisprudence which was not intended by the drafters of the Fourteenth Amendment.

CONCLUSION

Amici respectfully submit that the ruling of the court below is consistent with prior holdings of this Court, and should be affirmed with a clear statement that irrespective of the interest involved simple negligence is not a basis for the assessment of damages under 42 U.S.C. § 1983.

Respectfully submitted,

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